[2011] UKUT 59 (TCC)
Appeal number: FTC/75/2010

ASSESSMENT – whether notice of assessment required to state the statutory provision under which assessment is made – no – appeal dismissed

UPPER TRIBUNAL

TAX AND CHANCERY

PETER G GUNN **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JOHN F AVERY JONES CBE
EDWARD SADLER (JUDGES OF THE UPPER TRIBUNAL)

Sitting in public at 45 Bedford Square, London WC1 on 13 January 2011

Andrew Gunn for the Appellant

Adam Tolley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr P G Gunn against an anonymised decision of the First-tier Tribunal issued on 29 April 2010 [2010] UKFTT 419 (TC). The Appellant was represented by Mr Andrew Gunn, and the Respondent ("HMRC") by Mr Adam Tolley.

2. Although we say this is an appeal against a decision of the First-tier Tribunal, strictly it is against a point that we were told was argued before the tribunal but on which they did not make a decision. The issue is the validity of two assessments. The Appellant did ask the tribunal to review its decision "and conclude that the assessments were invalid as not meeting the conditions of s 114 TMA 1970." The First-tier Tribunal gave permission to appeal generally, presumably considering that this related to the conditions for making a discovery assessment, which is the point dealt with under their decision under the heading *Challenges to the validity of the Schedule D assessments*. The discovery assessment issue is not now pursued. We shall deal with the appeal as it is a pure point of law, but we consider that what the Appellant should have done was to apply to the Upper Tribunal to remit the matter to the First-tier Tribunal for them to make a decision on this issue, against which an appeal could have been made had the Appellant considered that such decision was wrong in law.

3. From the documents we find the following facts, which are not in dispute.

(1) The notices of assessment in question were both dated 16 September 2005. They were accompanied by a letter of the same date from HMRC Special Civil Investigations which starts:

> "I refer to my letter of 5th May 2005.
>
> I enclose assessments for the years ended 5th April 2000 and 5th April 2001 as outlined in my letter of 5th May 2005. The issue of the assessment was delayed to allow for responses to be made to letters received from Mrs Gunn in respect of my enquiry."

(2) The letter of 5 May 2005 is a detailed five-page letter setting out the basis for the Inspector's contentions that certain royalty payments were one of the following: annual payments made by a company for which the company should have deducted tax, employments for which the company should have deducted tax under PAYE, or Case I, Case II or Case VI income of the Appellant. The letter states, "I will shortly therefore be arranging for the issue of assessments for the years 1999/2000 and 2000/2001 tax years on the following amounts for Schedule D income. This should be treated as either Case I or II or Case VI Schedule D." There follows a statement of the amount of income for each of those years. The last paragraph of the letter states "The assessments are to be made under section 29(1) Taxes Management Act 1970." It also states that other assessments will be made in respect of the possible tax alternatives that are payable by the company (i.e. if the income is instead annual payments or employment income).

(3) The notices of assessment are also dated 16 September 2005 and are on Special Civil Investigations Office notepaper rather than an assessment form. We deduce that they were using up old notepaper as they are headed "Inland Revenue" even though the Commissioners for Revenue and Customs Act 2005 had on 7 April 2005 transferred their functions to HMRC, and one of them shows the title of a particular officer as Group Director printed at the bottom and the other the same officer as Area Director. In each case they give the amount of tax charged by the assessment and state that "The enclosed calculation forms part of this notice and shows how the amount charged has been arrived at." The enclosed form is the same in each case and has headings of "New total" and "Previously assessed" from which it appears that the new item in each of them is a figure for "Income from self-employment (as a sole trader)" (which is the same figure as stated in the letter of 5 May 2005). The calculation which then follows shows the amount of income tax which is payable in respect of that amount of income from self-employment, and the income tax calculated is the amount shown in the notice of assessment. They state that, "If you think this notice is wrong in any way, you should appeal in writing within 30 days from the date of issue above. An appeal form is enclosed….". In each case they also state that "Payment of the amount charged by this notice should be made on or before 16 October 2005. A payslip and payment instructions form part of your statement of account (if you have not received a statement, one will be issued shortly." It ends "Yours faithfully" and is signed by an officer.

4. The following provisions of TMA 1970 are relevant:

> "30A *Assessing procedure*
>
> (1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
>
> (2) All income tax which falls to be charged by an assessment which is not a self-assessment may, notwithstanding that it was chargeable under more than one Part or Chapter of ITEPA 2003 or ITTOIA 2005, be included in one assessment. (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made….
>
> 113 *Form of returns and other documents*
>
> …
>
> (3) Every assessment, determination of a penalty duplicate, warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual.
>
> 114 *Want of form or errors not to invalidate assessments, etc*
>
> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want

of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—

(a) by reason of a mistake therein as to—

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination."

5. Mr Gunn contends that the assessments are invalid because:

(1) They are not made on a form prescribed by the Board in accordance with s 113(3) Taxes Management Act 1970 ("TMA 1970").

(2) They do not state the statutory provision under which they are made, that is that they failed to state that they are made under s 29 TMA 1970 and that they are Case I (or II or VI) assessments. As support for the statutory provision being required he relies on the words in s 114 TMA 1970 "an assessment…which purports to be made in pursuance of any provision of the Taxes Acts…" (Further arguments were put forward on the requirement to have statutory authority for levying tax and the principles of interpreting tax legislation, which we did not consider were in issue.)

(3) They have the following further defects: that one of them is estimated (as to the 2000-01 assessment the 5 May 2005 letter asks for details of the licence fee payments from 1 November 2000 to the date the Appellant ceased to be non-resident in order to enable the estimated figure, which is a pro-rata share of the figure in the accounts, for this period to be revised) but does not state that it is estimated; there is no assessment number or taxpayer identification number; the appeal form was not enclosed; the payslip was not enclosed; the named officer cannot have been Group Director and Area Director; and the Inland Revenue did not exist at that time.

(4) The letter of 5 May 2005 cannot cure the defect of not referring to s 29 TMA 1970 because the Inspector can state in advance that an assessment would be made under one provision and then make it under a different one, see *Vickerman v Mason's Personal Representatives* [1984] 2 All ER 1. There the Inspector said he was going to assess under the former s 29(3)(c) TMA 1970 and then assessed under s 29(3)(b) which Scott J upheld.

6. Mr Tolley contends that there is no statutory provision which requires that a notice of assessment must state the statutory provision under which the assessment in

question was made. In any event the letter of 5 May 2005 told the Appellant that the assessments would be made under s 29 TMA 1970.

7. We do not consider that the issue raised by the Appellant arises on the facts of this appeal. The Inspector wrote to the Appellant on 5 May 2005 saying that he was going to assess the Appellant on Case I (or II or VI) profits under s 29 TMA 1970 (as well as assessing the paying company on various other bases). In the normal course we would have expected the notices of assessment to have followed a few days later but these were "delayed to allow for responses to be made to letters received from Mrs Gunn in respect of my enquiry," which we were told meant dealing with a complaint about the Inspector's conduct. When this was resolved the covering letter of 16 September 2005 enclosing the notices of assessment specifically said, "I enclose assessments for the years ended 5th April 2000 and 5th April 2001 as outlined in my letter of 5th May 2005." The attachment that was incorporated into the notice of assessment made it clear that the only difference between the "New total" and "Previously assessed" items was "Income from self-employment (as a sole trader)." In the circumstances it must have been clear to the Appellant (or his advisers) that this was a discovery assessment made under s 29 TMA 1970 charging him under Case I (or II or VI). Leaving aside the detailed criticisms of the form of the notice of assessment, which we deal with below, if there is any requirement to specify in the notice of assessment the provision of the Act under which the assessment was made (which we find below there is not) then it was satisfied in the Appellant's case. The situation is different from that in *Vickerman* as the letter of 5 May 2005 (which clearly specifies both that the assessments are to be made under s 29 TMA 1970 and that the charge to tax is under Case I or II or VI of Schedule D, and also includes the amount of income which then features in the respective notices of assessment) was incorporated by reference into the letter of 16 September 2005 accompanying the notices of assessment so there was no possibility that the Inspector had changed his mind about the basis for the assessments between the two letters.

8. Because the point was argued we will determine whether there is any requirement to state in a notice of assessment the statutory provision under which the assessment is made. We agree with Mr Tolley that there is no statutory provision requiring the notice of assessment to state this. The words in s 114 "an assessment…which purports to be made in pursuance of any provision of the Taxes Acts…" cannot contain an implication that the provision of the Taxes Act must be stated in either the assessment itself or the notice of assessment. First, this is a provision relieving mistakes in the assessment and not the place where the requirements for a valid assessment are to be found. The apparent explanation for the words is that an assessment clearly is made pursuant to a provision in the Taxes Act, but if for any reason it is defective it is not made pursuant to a provision in the Taxes Act (because of the defect), and hence s 114, seeking to put right the defect, has to say that it is purportedly made under the relevant provision – in other words "an assessment which would have been valid had it been properly made under the provision under which it purports to have been made shall be valid." Secondly, if such an important requirement existed the statute would state that requirement clearly, as it does for the requirements in s 30A(3) relating to the date of issue and the time limit for appealing.

9. As to s 113(3) TMA 1970 there is no evidence about whether the form of the notice of assessment used in the Appellant's case has been prescribed by the Board. As the burden of proof is on the Appellant to show that it is not in a prescribed form (and if the point had been raised before the hearing of the First-tier Tribunal the tribunal would have been able to ensure that HMRC said whether or not it was), we cannot make any finding on this. This does not take us any further because without knowing what the prescribed form should have contained we cannot find whether or not it was in accordance with the prescribed form.

10. We need to consider the effect of s 114 TMA 1970 in the light of Mr Gunn's other criticisms of the notices of assessment. We cannot accept that the appeal form was not enclosed, or that the payslip was not enclosed as there is no finding of fact to this effect by the First-tier Tribunal. If (which we doubt) it is necessary to identify an estimated assessment as such in the notice of assessment, that was done by the covering letter enclosing the notice of assessment, which refers to the 2000-01 assessment being "as outlined in my letter of 5th May 2005," which explained how the figure was arrived at and asked for the correct figure. It clearly does not matter whether a named officer was area director or group director. There is also no requirement for an assessment number or taxpayer number to be stated. The only point of possible substance is that the notices were headed "Inland Revenue" which had ceased to exist on 7 April 2005 pursuant to the Commissioners for Revenue and Customs Act 2005. We did not hear any argument on this, presumably because it was not in Mr Gunn's skeleton but bearing in mind the covering letter on HMRC notepaper if it is necessary to do so we find in accordance with s 114 TMA 1970 that the notices of assessment were "in substance and effect in conformity with the Taxes Act."

11. Accordingly we find that the assessments are valid and dismiss the appeal.

12. Mr Gunn resisted Mr Tolley's application in principle for costs if HMRC won on the basis that this was his first bite of the cherry on this point. As we have said, we consider that having failed to persuade the First-tier Tribunal to review its decision and having been granted permission to appeal, the Appellant should have applied to the Upper Tribunal to remit the appeal to the First-tier Tribunal to make a decision on the validity aspects that had been argued but on which no decision had been given. In that way there would have been no costs of substance in the Upper Tribunal. As it is we have heard this appeal and consider that costs should follow the event in the normal way. We award costs in favour of HMRC in principle subject to their making an application in accordance with the Rules.

JOHN F AVERY JONES

EDWARD SADLER

JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE: 08 February 2011